



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY NUMBER 349 OF 2014

BETWEEN:

YOHANE KAWELUZA.....PLAINTIFF

-AND-

ETG PAROGATE..... DEFENDANT

Coram:

Hon. Justice Kamwambe

Mr. Kwakwala Counsel for the Plaintiff

Mr. Kaduya Counsel for the Defendant

Mrs. M. Pindani, Chief Court Reporter

Mr. Nicholas Phiri, Court Clerk

JUDGMENT

By a writ of summons filed on the 31st of March 2014 the Plaintiff claims for damages for personal injuries sustained at the Defendant's work place in the city of Blantyre. He alleges negligence on the part of the Defendant. The plaintiff lost three of his fingers on the right hand.

FACTS

The Plaintiff was employed by the Defendant in or about January, 2014 as a General Factory worker. On or about 20th March, 2014 while in the course of his employment, electricity supply at the Defendant's factory went off and the Plaintiff was asked to go to another department where he had not worked before to assist in cleaning of machines. Whilst cleaning the said machines, the electricity supply became on and the Plaintiff's hand got trapped in the machine. The Plaintiff got injured and three of his right hand fingers got chopped off. The Plaintiff avers in the statement of claim that the accident happened due to the negligence of the Defendant in that:

- i- He failed to take any adequate precautions for the safety of the Plaintiff while he [the Plaintiff] was engaged upon the said work.



- ii- He exposed the Plaintiff to a risk of injury or damage which he [the Defendant] knew or ought to have known.
- iii- He failed to provide a safe place of work for the Plaintiff.
- iv- He caused or permitted the Plaintiff to use the said machine when it was defective and unsafe to do so.
- v- He failed to take any adequate measures to ensure that the machine was safe to use and to work with.
- vi- He failed to provide or maintain a safe or proper system of work.
- vii- In so far as applicable the Plaintiff relied on the doctrine of *res ipsa loquitur*.

Hence, Plaintiff seeks damages for:

- 1- Pain and suffering
- 2- Loss of amenities of life
- 3- Disfigurement
- 4- K5, 000.00 special damages for procuring a medical report
- 5- Costs for the action.

What has to be proved on a balance of probabilities is that the negligence of the Defendant caused the injuries mentioned by way of not providing the Plaintiff with safety working devices, failing to provide a safe system of work to the Plaintiff, exposing the Plaintiff to a risk of injury, failing to take adequate measures to ensure that the machine was safe to use and permit ting the Plaintiff to use the said machine when it was defective and unsafe to use.

The court is called upon to also consider contributory negligence.

Plaintiff is claiming both under common law negligence which encompasses breach of duty to take care, and, secondly, under statute known as breach of statutory duty to take care of an employee. To prove negligence under statute it must be shown that:

- a- The Defendant owed a legal duty of care towards the Plaintiff.
- b- The Defendant breached that duty and
- c- Plaintiff suffered damage or loss as a result of the breach.

Every person must take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to injure persons within reasonable contemplation. [Donogue v Stevenson (1932)] A.C 562.

Under the Occupational Safety, Health and Welfare Act, No. 21 of 1997 an employer owes a duty of care to his employees to provide safe place of work and safe system of work. Section 13(1) of the Act provides:

‘It shall be the duty of every employer to ensure the safety, health and welfare at work of all his employees.’

Under section 13(2) of the Act the duties include:

- a- Arrangements for ensuring safety and absence of risks of health in connection with the use, handling, storage and transportation of articles and substance.
- b- The provision of information, instruction, training and supervision in accordance with section 65 to ensure the safety and health at work of his employees.

Section 65 (1) of the Act states that:

“Every worker in a workplace shall be adequately and suitably:

- a- Informed of potential health hazards to which he may be exposed to at the work place.
- b- Instructed and trained in the measures available for prevention and control protection against health hazards at work place”.

Where the nature of the work is dangerous, the employer is required to provide the employees with specialized instructions and training. Hence, section 65(3) of the Act provides:

“Specialized instructions and training shall be given to:

- a- *Drivers and operators of lifting appliances, transport vehicles, earth moving and material handling equipment and plant, steam boilers and machinery or equipment of specialized or dangerous nature.*

According to **Blyth v Birmingham water works Company** (1856) 11 ex. 781 explaining the common law position, one breaches a duty of care or is negligent when he omits to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or does something which a prudent and reasonable person would not do.

In **Winter v Cardiff R.D.C.** 1950 1 All ER 819, 823 Lord Mac Dermott said to the effect that at common law the employer’s duty is not absolute and it is for the Plaintiff to prove its breach. This means that if the workman cannot prove negligence, whether by direct evidence or with the aid of the maxim *res ipsa loquitur*, an action based upon breach of the employer’s personal duty must fail.

Breach of statutory duty by an employer would lead to liability where there is failure to provide safety devices and specialized instruction and training to employee and fails to supervise his employees on the conduct of their work. On a balance of probabilities the court must be convinced that there was a failure to comply with the safety standards as provided for in the Occupational, Safety, Health and Welfare Act and/ or failure to carry out a duty of care toward his employee. Both give rise to a cause of action.

According to DW1's testimony, before one is asked to operate the machine they are told about the safety measures. The Plaintiff was given an explanation on how the machine works. In cross examination DW1 told the court that safety tips were indeed given to the Plaintiff and that no special training is required for one to operate the machine. Furthermore, the Plaintiff had observed how the machine works before. However, DW1 also told the court that he could not blame the Plaintiff for the accident since he was the first time worker who was not fully aware of how the machine works. This court is convinced that a mere observation on how the machine works does not constitute 'training' as specified in the Occupational, Safety, Health and Welfare Act. The court is also convinced that the explanation which was given to the Plaintiff prior to working on the machine did not constitute 'specialized instruction' as required by the Act. Where the nature of the work is dangerous, it is the statutory duty of the employer to provide the employees with specialized instructions and training. Since no specialized instruction and training were provided there was a breach of statutory duty occasioned by the Defendant.


On the issue of protective gear, it was submitted by the plaintiff that he was not given gloves when he was cleaning the machine. However, in cross examination he stated that even if he had put on gloves, the machine would have crushed both the gloves and the fingers. In his testimony, DW1 told the court that gloves would not have prevented the injury. It would not be wrong to say that a duty under statute to provide protective wear should not be applied willy nilly at one's convenience without regard to its useful use [**Victoria Bema vs Flexible Packaging Industries (Firm) and Nico General Insurance Company Limited Civil Cause NO. 2804 of 2009**]. When the locus in quo was conducted, it was witnessed that gloves were not essential in the operation of the machine. Since no protective devices were necessary in operating the machine there was no breach of statutory duty occasioned by the Defendant.

The Plaintiff alleges that the lights were switched on when he was cleaning the machine leading to his injury. He testified that the power was off when he started cleaning the machine and that somebody just switched it on whilst he was busy removing the cakes. DW1 told the court that the machine was working on and off and that the time the Plaintiff was cleaning the machine it was indeed off but still rotating. The Plaintiff decided to put his hand in but got stuck and his fingers were chopped off. In cross examination DW1 told the court that the Plaintiff and others were told that if the machine is rotating, they were supposed to wait for the machine to completely stop. This court is convinced that since it was the Plaintiff's first time to operate the machine, the presence of the supervisor would have been more vital. Close supervision was imperative for a first timer. Any laxity by the supervisor will obviously lead into such disaster. No reasonable steps of care were taken by the supervisor to see to it that the first timer does not injure himself. This constituted a breach of statutory duty under section 13(c) as read with section 65 (1) (a) of the Occupational, Safety, Health and Welfare Act.

The Plaintiff also alleges that the Defendant caused or permitted him to use the machine when it was defective and unsafe to do so and that the Defendant did not take any adequate measures to ensure that the machine was safe to use and to work with. In so far as applicable the Plaintiff relied on the doctrine of *res ipsa loquitur*. On whether in the circumstances the Plaintiff can rely on the doctrine of *res ipsa loquitur* the law is clear in that where the cause of the accident is known this doctrine has no application and that it becomes the duty of the Plaintiff to prove whether upon the facts of the case negligence on the part of the Defendant is proved or not [Phekani vs Automotive Products Limited (1996) MLR 23].

On a balance of probabilities this court is convinced that there was a failure by the employer to comply with the safety standards as provided for in the Occupational, Safety, Health and Welfare Act. The Plaintiff has succeeded to prove statutory breach of duty giving rise to injuries, as such, this claim succeeds.

Pronounced in open court this 8th day of February, 2017


M.L KAMWAMBE
JUDGE